



# Freedom of Information Act



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# DoD FOIA

## Organization

- DoD Chief FOIA Officer
  - Director of Administration and Management, Mr. Michael Rhodes
- FOIA Public Liaisons
- FOIA Requester Service Centers



# DoD FOIA

## Components

- Office of the Secretary of Defense/Joint Staff
  - Combatant Commands, TRICARE, DoDEA, DTIC, NGB, MDA, ASBCA
- Department of the Army
- Department of the Navy
- Department of the Air Force
- Defense Information Systems Agency
- Defense Contract Audit Agency
- Defense Contract Management Agency



# DoD FOIA Components

- Defense Commissary Agency
- Defense Finance and Accounting Service
- Defense Intelligence Agency
- Defense Logistics Agency
- Defense Security Service
- Defense Threat Reduction Agency
- National Geospatial-Intelligence Agency
- National Security Agency
- National Reconnaissance Office
- Office of the Inspector General



# Recent FOIA Developments

## **OPEN Government Act of 2007**

- Emphasized Congressional unhappiness with Agency processing of FOIA requests.
- Congress determined that agencies must be held accountable if they do not respond in a timely manner.



# Recent FOIA Developments

## Presidential Memos, Jan. 21, 2009

- **FOIA Memorandum**
- “A democracy requires accountability”
- “In the face of doubt, openness prevails”
- “Adopt a presumption in favor of disclosure”
- “Take affirmative steps to make information public”



# Recent FOIA Developments

## Presidential Memos, Jan. 21, 2009

- **Transparency Memorandum**
  - *"Transparency promotes accountability"*
  - *"Government should be participatory"*
  - *"Government should be collaborative"*





# Recent FOIA Developments

## Attorney General Memo March 19, 2009

- Presumption of Openness
  - *Agencies are encouraged to make **discretionary** releases*
  - *DOJ will defend agency denial decisions in litigation only if the agency reasonably **foresees a harm** protected by a FOIA exemption or release is forbidden by law.*





# Recent FOIA Developments

## **Attorney General Memo March 19, 2009**

- Exemptions subject to a discretionary release are those that protect a “government interest”
  - Exemptions 2, 5, and parts of 7
  - Discretionary releases are most applicable under Exemption 5



# The Administrative Process

## FOIA Administrative Process

### Overview

- Receipt of a written FOIA request
- FOIA Office directs/tasks a search for responsive records
- FOIA Office coordinates multiple reviews
- Release determination made and response letter sent to requester
- Right to file an administrative appeal
- Right to file a FOIA lawsuit in federal district court



# The Administrative Process

- Request must be assigned a tracking number and entered into a tracking system
- A proper, or “perfected” FOIA request:
  - *Reasonably describes the records sought,*
  - *Should have a willingness to pay fees, and*
  - *Must be made in accordance with the agency’s published regulations.*
- A misdirected request is one that is initially sent to the FOIA Requester Service Center that does not have cognizance over the requested records.



# The Administrative Process

- An employee familiar with the subject area can locate the requested record with a “reasonable amount of effort.”
- FOIA Offices must establish a telephone line or internet service that provides FOIA requesters with the date the request was received and an estimated date when the request will be completed.



# The Administrative Process

## 20 Day Time Limit

- Components have 20 working days to make a release determination.
- Time period starts upon receipt of a perfected request by the appropriate DoD Component.
- If misdirected request is received from another DoD Component, the time period begins no later than 10 days after it is first received by a DoD Component FOIA office.



# The Administrative Process

## 20 Day Time Limit

- Time limit can be tolled once to obtain additional information (not fee related) “reasonably requested” from the requester.
- Time limit can be tolled an unlimited number of times if it’s “necessary” to clarify fee assessment issues with the requester.
- Clock starts again when an answer is received from requester.



# The Administrative Process

- The fact that a FIOA request is very broad or “burdensome” does not entitle an agency to deny the request.
- Request extension if you cannot meet 20-day time frame due to unusual circumstances.
  - Volume
  - Consultation with another Agency
  - Geographical location of records





# The Administrative Process

## An Adequate Search

- Agencies must undertake a search that is “reasonably calculated to uncover all relevant documents.”
- Must search everywhere it is reasonably likely responsive records exist.
- Emails and other electronic records are treated the same as other records.
- Amount of search time provided free depends on fee status of requester.



# The Administrative Process

## Conducting A Search

- Best practice: Keep a record of where you searched and the search terms used to conduct search.
- Think outside the box - should we have responsive records?
- If not, who would?
- If necessary, create a list detailing the found documents.



# The Administrative Process

## Records Found

- Determine responsiveness of located records. Check dates, addressees, originators, subjects, etc.
- Were records located responsive to each item listed in the request?
- Note “no records” for those items for which you found no records.
- Include all responsive documents, regardless of originator, use, or classification.



# The Administrative Process

## Agency Records

- Supreme Court defined an agency record as:
  - Either created or obtained by an agency, and
  - Under agency control at the time of the FOIA request.



# Agency Records

- Courts have applied 4 factors to identify “control”:
  - The intent of record’s creator to retain or relinquish control over the record;
  - The ability of the agency to use and dispose of the record as it seems fit;
  - The extent to which agency personnel have read or relied upon the record; and
  - The degree to which the record was integrated into the agency’s records systems or files.



# The Administrative Process

## Reviewing Documents

- Make a copy of or scan the responsive documents.
- Conduct a line-by-line review and indicate exempt information that should be withheld.
- Do not mark original documents
- Must identify other agency equities contained in your documents:



# Reviewing Documents

- Referrals--your file contains documents that originated with another DoD Component or another Federal agency. You should make a release determination on your information within these documents, if any, and refer them for response to the requester.





# Reviewing Documents

- Consultation--your document contains information that originated with another DoD Component, another Federal agency, or another nation or other entity. You must consult with the other entity to obtain its recommendation for release of this information.



# Reviewing Documents

- Cite all exemptions that you think apply to the exempt information.
- Discern releasability, do not accept document markings without a review.



# Reviewing Documents

- Duty to segregate: The FOIA requires that agencies review each document, line-by-line, to determine if there is non-exempt information that can be segregated out for release.
- Courts are especially interested that agencies comply with this requirement.



# The Administrative Process

## Release

### Determination

- Release determinations are communicated to the requester in response letters.
- Documents must indicate deleted information with black/shaded areas or brackets.
- Redacted areas must have applicable exemptions.
- If pages are withheld in their entirety, requester must be informed of approximate amount of material withheld (number of pages, not documents).



# Release Determination

- Response should address each item in multiple-item requests.
- Must cite statutory authority (an exemption) to withhold information in response letter.
- Information is withheld by the Initial Denial Authority (IDA).
- If IDA doesn't sign the response letter, inform requester of name and official title of IDA.
- Appeal rights must be provided for denied information.



# Administrative Appeals

- The FOIA provides the requester with the right “to appeal to the head of the agency any adverse determination.”
- Adverse determinations are:
  - Partial or complete denial of information.
  - No record determination.
  - Denial of fee category claim.
  - Denial of fee waiver.
  - Denial of expedited review.
- Any determination a requester believes to be adverse in nature.



# The Administrative Process

## Fees

- OMB'S Uniform FOIA Fee Schedule and Guidelines, 52 Fed. Reg. 10012 (Mar. 27, 1987)
- OPEN Government Act of 2007





# Fee Definitions

- **Search**
  - All time spent looking.
  - Time to determine if document is responsive.
  - May charge for no records.
  - Not applicable to applying exemptions
  - Manual and computer searches.
  - Includes time to program a computer to produce requested report from a database.
  - May charge for search when requester appeals adequacy of initial search.



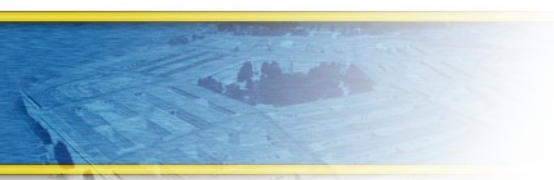
# Fee Definitions

- **Review**

- Examining responsive documents for exemptions.
- Excision or redaction time, including electronic redaction.
- Does not include resolving law or policy unrelated to exemptions.
- Chargeable only to commercial requesters.
- Applicable to initial reviews only.



# Fee Definitions



- **Duplication**

- Duplicating copy for requester.
- Paper copy, microfiche, audiovisual.
- Magnetic tape/disc.
- Not duplicating for eternal use.
- Computer and audiovisual files fees are computed by multiplying time to duplicate the product times the rate of the employee.



# Fee Limits

- Do not charge for search time if:
  - The agency does not comply with the 20-day time limit, and
  - No unusual or exceptional circumstances apply to the processing of the request.



# New Fees

## Effective with new DoD 5400.7-M

Administrative/Clerical	GS4/YB1/E4 and below/ Admin Contractor	\$24
Professional Level 1	PB1/YB2/GS5-GS9/E5 and E6/Junior Contractor	\$44
Professional Level 2	PB2/YB3/GS10-GS13/ E7-O3/Mid-Lvl Contractor	\$56
Professional Level 3	PB3/GS14 and GS15/ O4-O6/Senior Contractor	\$100



# Fees Categories

Commercial

Search, review, and duplication

Educational/  
noncommercial  
scientific  
institutions and  
news media

Duplication only,  
first 100 pages free

All others

Search and  
duplication, first  
100 pages free



# Representative of the News Media

- **Any person or entity:**
  - Gathering information of potential interest to a segment of the public,
  - Uses its editorial skills to turn the raw material into a distinctive work, and
  - Distributes that work to an audience.
- News is information that is about current events or that would be of





# Representative of the News

## Media Examples

- Television; radio; publishers of periodicals.
- Publishers of periodicals who make their products available for purchase by or subscription by or free distribution to the general public.
- Electronic dissemination of newspaper through telecommunication services.
- Agencies shall consider such



# Representative of the News Media

- A **free-lance journalist** is regarded as working for a news media entity if:
  - The journalist can demonstrate a solid basis for expecting publication through that entity.
  - A contract is an example of a solid basis for such an expectation.
  - The Component may also consider the past publication record of the requester.



# Educational/Scientific

- Purpose of educational institution is scholarly research.
- Request must serve a scholarly research goal of the institution, rather than an individual goal.
- Examples are:
  - Pre-school, public or private elementary or secondary school,
  - Undergraduate and graduate education,
  - Vocational education which operates



# Educational/Scientific

- Non-commercial scientific institution requesters:
  - Not operated on a “commercial” basis; operates solely for conducting scientific research, results of which do not promote any product or industry.

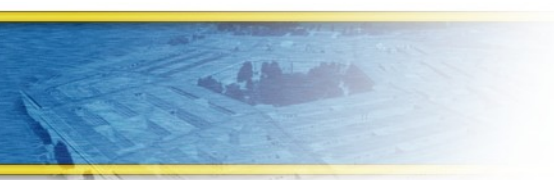


# Other Requesters

All who do not fit into the above categories.



# Other Fee Issues



- Willingness to pay fees
- Statutory fee restrictions
- Advance payments
- Aggregation of fees
- Other charges – “Special” Services – OMB guidelines



# Fee Waivers

Statutory standard – Fees should be waived or reduced...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester.





# Fee Waivers

## Preliminary Questions

- Responsive records
- Timing
- Automatic entitlement
- Burden of proof
- Insufficient Information



# Fee Waivers

## Preliminary Questions

- Standard of Judicial review – de novo
- Administrative record
- Releasable information
- Indigence
- Appeal rights



# Expedited Processing

- A determination to grant or deny expedited processing must be made by the agency within 10 calendar days.
- Expedited processing will be granted:
  - Where the requester demonstrates a compelling need, and
  - In other cases determined by the agency.



# Expedited Processing

- **Compelling need exists when:**
  - The failure to obtain records expeditiously could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or
  - A person primarily engaged in disseminating information has an urgency to inform the public about actual or alleged Federal Government activity.



# Expedited Processing

- Other cases for expedited processing within DoD:
  - Humanitarian need, or
  - Imminent loss of due process rights.



# Administrative Appeals

- No statutory requirements for language of appeal; however, DoD 5400.7-R stipulates 60 days.
- Must file an administrative appeal before filing a lawsuit in federal district court.
- Can file an appeal from the failure to respond within 20 days.



# Administrative Appeals

- Appeals are reviewed and adjudicated by the agency appellate authority.
- Review of administrative record - keep good notes.
- After an appeal is filed, requester can proceed to court.





# Communication with

## Requesters

- Provide tracking number and telephone number.
- Use discretion in allowing a staff person to talk to the requester.
- To help the requester get the requested information sooner, communicate to narrow the scope of or clarify the request.
- Resolve fee issues.
- Have agreements in writing.



# Freedom of Information Act

## FOIA Exemptions



# **Freedom of Information Act**

## **FOIA Personal Privacy Exemptions**



# Exemptions 6 & 7(C)

- **5 U.S.C. § 552(b)(6) and (b)(7)(C)**
- Exemption (b)(6) permits the government to withhold information about individuals in “personnel and medical files and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.”



# Exemptions 6 & 7(C)

- Exemption (b)(7)(C) permits the withholding of information compiled for law enforcement purposes the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”
- Both Exemption 6 and 7(C) require a balancing of the privacy interest with any public interest in disclosure.



# Exemptions 6 & 7(C)

## 4-Step Analysis:

- 1) Which exemption applies (Threshold question)?
- 2) Is there an identifiable privacy interest?
- 3) Is there a legitimate public interest?
- 4) Balance the two interests.



# Exemptions 6 & 7(C)

- Examples of Privacy Interests:
  - Age
  - Marital status
  - Dependent information
  - Types of leave
  - Home address (postal and email)
  - Disciplinary actions





# Exemptions 6 & 7(C)

- **Examples of Privacy Interests:**
  - Medical conditions and disabilities
  - Performance appraisals
  - Criminal convictions
  - Information about unsuccessful job applicants, including names
  - Information that, although perhaps once public, has become “practically obscure.”



# Exemptions 6 & 7(C)

- Examples where there is no Privacy Interest:
  - Deceased individuals generally have no privacy interests; however, courts have recognized “survivor privacy interests”
  - Corporations
  - Federal employees, except for some federal agencies (DoD names policy)
  - Identities of FOIA requesters



# Exemptions 6 & 7(C)

- **Public Interest under the FOIA**
  - That which sheds light on the operations and activities of the federal government - Reporters Committee case.
  - Focus on agency's conduct, not personal conduct of individuals
  - Information about private citizens will rarely shed light on the operations and activities of the government.



# Exemptions 6 & 7(C)

As of November 9, 2001, as a result of the declaration of a National Emergency by the President on September 14, 2001, it is the policy of the Department of Defense not to release lists of names of DoD personnel (to include military, civilian, and contractor personnel) to the public under the FOIA.

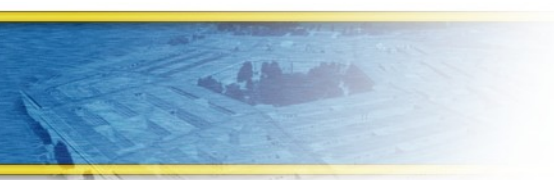


# **Freedom of Information Act**

**An Exemption  
allowing for Other  
Statutes**



# Exemption 3



- **5 U.S.C. § 552(b)(3)**
- Applies to information specifically exempted by a statute establishing particular criteria for withholding.



# Exemption 3 Statutes

- Contractor proposals, 10 U.S.C. § 2305 (g)
- Personnel in overseas, sensitive, or routinely deployable units, 10 U.S.C. § 130b
- Sensitive information of foreign governments and international organizations, 10 U.S.C. § 130c
- Protection of organizational and personnel information for DIA, NRO, and NGA, 10 U.S.C. § 424





# Exemption 3 Statutes

- Debriefing of a missing person returned to U.S. control, 10 U.S.C. § 1506 (d) and (f)
- Communications intelligence, 18 U.S.C. § 798 (a)
- Information regarding atomic energy: Restricted Data and Formerly Restricted Data, 42 U.S.C. § 2162(a) [RD] and 42 U.S.C. § 2168(a)(1)(C) [FRD]

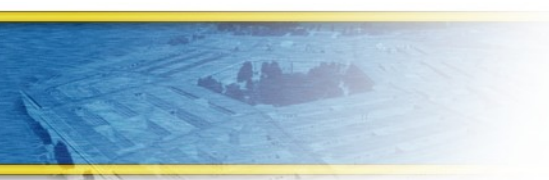


# **Freedom of Information Act**

## **Commercial Proprietary Exemption**



# Exemption 4



- **5 U.S.C. § 552(b)(4)**
- Applies to information such as trade secrets and commercial or financial information obtained from a person on a privileged or confidential basis.



# Exemption 4

## The Unit Price Issue

- The release of unit prices has a history of contentious litigation.
- McDonnell Douglas v. NASA – Held, under the facts of the case, that disclosure of unit prices would cause substantial competitive harm.
- New DoJ guidance – May 29, 2002
- DoJ analysis – October 4, 2002



# Exemption 4

## **Executive Order 12,600**

### **Considerations**

- Notify submitter
- Receive comments
- Evaluate submitter's comments
- Notify again if agency intends to disclose
- Give disclosure date



# Exemption 4

## **“Reverse” FOIA Litigation**

- Review is based on the administrative record Administrative Procedures Act, 5 U.S.C. § 706
- An agency’s decision is to be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.



# Exemption 4

- National Parks & Conservation Ass'n v. Morton – Commercial or financial information is “confidential” for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) To impair the government’s ability to obtain necessary information in the future; or (2) To cause substantial harm to the competitive position of the person from whom the information was obtained.





# Exemption 4

- Critical Mass Energy Project v. NRC – The tests for confidentiality set forth in National Parks were confined “To the category of cases to which [they were] first applied; namely, those in which a FOIA request is made for financial information a person was obliged to furnish the government.



# Exemption 4

- In Critical Mass, the DC Circuit announced an entirely new test for the protection of information “voluntarily” submitted: Such information is now categorically protected provided it is not “customarily” disclosed to the public by the submitter.

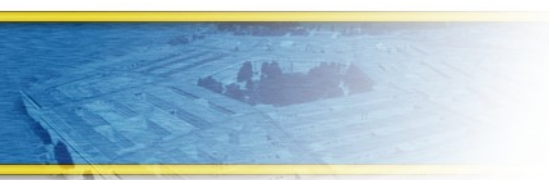


# Exemption 4

- Department of Justice guidance on distinguishing a “voluntary” from a “required” submission:
- A submitter’s voluntary participation in an activity does not determine whether any information submission made in connection with the activity is “voluntary.”



# Exemption 4



- Determinations should be made according to the circumstances of information submission, focusing on whether the submission of information is required of those who choose to participate.
- The information can be required to be submitted by a range of legal authorities, including formal mandates that call for submission as a condition of doing business with the government.



# Freedom of Information Act

## **Exemption for Privileged Information**



# Exemption 5

- **5 U.S.C. § 552(b)(5)**
- Protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.”



# Exemption 5

- Exemption 5 threshold issues:
  - Inter-agency (between) or intra-agency (within)
  - Memorandum or Letters
  - “Not available” – information normally privileged in civil discovery





# Exemption 5

- Three main privileges:
  - Deliberative Process Privilege
    - Designed to facilitate agencies' decision making process
  - Attorney Work Product Privilege
  - Attorney Client Privilege



# Deliberative Process Privilege

- Three rationales:
- Protect candor of the decision makers.
- Protect against premature disclosure of proposed policies.
- Prevent confusion of the public.



# Deliberative Process

## Privilege

Two parts to this privilege

1. The information must be **predecisional**:

- “Antecedent to the adoption of an agency policy”.
- Not final agency decisions or statements of agency policy.
- Not post-decisional statements that explain decisions.
- Usually flows from employee to supervisor.



# Deliberative Process

## Privilege

2. The information must be **deliberative**:

- Analysis, evaluations, comments, advice, recommendations.
- A draft of a final document may be protected.
- Stamping a document a “Draft” will not on its own provide protection from disclosure.



# Deliberative Process

## Privilege

- Normally, cannot protect facts. Two exceptions:
  - Selection of facts is deliberative in nature, or
  - Facts are inextricably intertwined with the deliberative material.



# Attorney Work Product

## Privilege

- Protects adversarial trial process by insulating attorney's preparation from scrutiny.
- Protects documents prepared by an attorney or at his or her direction in reasonable anticipation of litigation - can be used to cover work done by law enforcement agents/ investigators.



# Attorney Work Product

## Privilege

- Government must prove anticipation of litigation
- No temporal limitation—protection does not end when litigation is over
- Can protect the facts



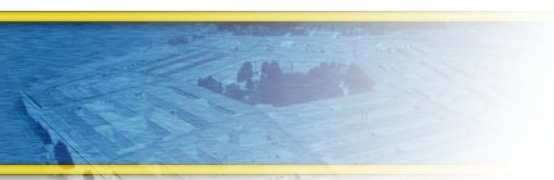


# Attorney Client Privilege

- Protects confidential communications between an attorney and client regarding a legal matter for which client seeks professional advice.
- Protects facts divulged by client to attorney and opinions given by attorney based on those facts.
- Confidential communications within the government.



# Other Privileges



- Presidential Communications.
- Aircraft Accident Witness Statements.
- Government Trade Secret.



# Freedom of Information Act



**“Take this, Hogan, and hide it from the public.”**